

Consular Corner

September 2011

by: Liam Schwartz*

Consular Sweep

The State Department's Office of Inspector General (OIG) has recently published a series of inspection reports covering a large sweep of U.S. consular posts around the world. While much of what the OIG reports is positive, the published findings also include some extremely frank criticism.

This month, we look at two inspections involved in this consular sweep: Mission South Africa and Embassy Bogotá.

Mission South Africa

The OIG report opens with praise for American consular operations in South Africa:

“Mission South Africa’s three consular sections provide generally good customer service with minimal wait times.”

But the OIG then begins to look under the carpet, beginning with the Consulate General in **Cape Town**:

“Cape Town’s consul general has not provided strong leadership or management oversight within the consulate. Her leadership style has resulted in fragmentation of her team of 25 American employees, which has dampened moral and lowered productivity. The consul general has not successfully communicated her vision and direction, leaving some employees unaware of the role of the consulate general in the mission. Her weak oversight of management operations allowed unresolved issues to fester, damaging staff confidence in her problem-solving abilities.”

Ouch. Consulate General **Johannesburg** also came in for some harsh feedback, beginning with the information that the consulate tends to lose passports; apparently, the number of lost passports is so large that OIG was compelled to add to the inspection report a classified annex on the issue.

The report praises the consular section chief for his “open door policy” that makes the staff “comfortable consulting him on complex cases.” That said, day-to-day operational oversight of the immigrant visa, American citizens services and fraud prevention units falls primarily to a cadre of entry-level officers. As a result, CG Johannesburg was found to be adjudicating SB-1 applications for Returning Resident Status improperly, and managing DNA testing incorrectly.

Both these issues have since been rectified, but, says the report, they “could have been avoided with closer senior officer training and oversight.”

Consulate General **Durban**, the OIG inspection team believes, should be downsized, if not closed altogether. The smallest constituent post in Mission Africa, CG Durban costs American taxpayers nearly \$2 million to operate and maintain (excluding staffing costs). The OIG: “Consular clients could be served by Consulate General Johannesburg, an hour away by air...Closing the consulate should be considered. While the consulate staff contribute to mission goals, it is not essential to have a permanent presence to get the job done. Closing would result in considerable savings of U.S. taxpayer monies.”

Under the heading of *scary but necessary*, the OIG concludes with praise for Consulate General Cape Town’s innovative practice for prioritizing equipment for destruction. According to the report, consular emergency plans require arrangements for decommissioning sensitive items. “Chaos is rampant during an emergency. The ability to identify and determine the current prioritization for equipment destruction is essential.” To its credit, CG Cape Town has innovated and installed a color code tag system allowing for an easy way to identify the order for equipment destruction in the midst of any such rampant chaos. Congratulations, and we pray this innovation will never have to be out to the test.

Embassy Bogotá, Colombia

Bogotá’s consular services are generally characterized by the OIG as “excellent,” with a “motivated and cohesive” cadre of first and second tour (FAST) officers. Still, some elements of the consular operations are below par, if not outright dysfunctional.

Bogotá’s NIV unit will process a whopping 290,000 cases in FY 2011. In looking at how the talented group of FAST officers adjudicates this enormous workload, the OIG found large inconsistencies in the manner in which visa requests are decided. Per the report: “Individual adjudicators’ performances varied considerably – refusal rates varied from 20 to 40 percent.” In other words, visa applicants in Bogotá face a palpable “luck of the draw” element in the critical decision regarding their eligibility for a visa.

To remedy this inappropriate situation, the OIG recommends that nonimmigrant visa managers establish a regular schedule for discussions on adjudication criteria and interviewing techniques to standardize the process and make refusal rates among officers more uniform.

The ability of the officers to properly adjudicate visa cases is significant hampered by what the OIG calls a “dysfunctional” Fraud Prevention Unit (FPU). This is particularly unfortunate given that Colombia has “one of the most pervasive and sophisticated fraud environments in the world.” Indeed, NIV adjudications take place in an environment “replete with document fraud and

verbal misrepresentation. Adjudicators must also remain alert to applicants with serious grounds for ineligibility—including narcotics traffickers, money launderers, and terrorists—and their family members.”

According to the OIG, there are several reasons for why the services provided by Bogotá’s FPU are impaired:

1. The FPU chief has little overseas consular experience and has not elucidated a strategic vision for the unit.
2. The FPU chief has not created a fraud prevention plan, as is required by the Consular Management Handbook.
3. Officers rotated into the FPU are not among the longest-serving officers in the consular section. For example, the deputy fraud manager had only 4 months of visa experience in Bogotá before she rotated into the FPU.
4. The FPU spends a disproportionate amount of time performing activities that yield few results. For example, the unit estimates that it spends 40 percent of its resources vetting groups of Colombians to ensure that they are legitimate. Recently, no illegitimate groups have been identified and the number of bogus group members has been very small.
5. One of the most important roles that the FPU can play is to provide line officers with feedback via validation studies. These studies are required for all referral cases. In Bogotá, the FPU staff had not completed any validation studies from May 2010 to February 2011.

The OIG inspectors continue:

“One measure of the dysfunction of the unit is the percentage of cases referred from the visa interview line that are confirmed as fraudulent. In Bogotá’s case, in approximately 90 percent of the cases that the FPU reviewed, it found no evidence of fraud. That means that the line officers do not have the knowledge to identify fraud and/or that they are reluctant to issue visas without a check by the FPU. In any case, it is a poor use of the line officers’ and FPU’s time to review cases that are overwhelmingly not fraudulent. In addition, several of the NIV officers commented that they did not get useful information from the FPU.”

To begin resolving this untenable situation, the OIG recommends that Embassy Bogotá, in coordination with the Bureau of Consular Affairs, convene a fraud prevention planning conference to create a fraud prevention plan that meets the needs of the consular line officers and other constituents.

Too Much Information?

The OIG's inspection report of Embassy Bogotá adds a “factoid” regarding the consular section that might come under the heading of *too much information*. According to the report, several of the locally employed (LE) staff members are so unusually short that, for consular management, “finding appropriate seating has been a challenge.” The OIG’s recommendation is this: “Embassy Bogotá should find reasonable seating accommodation for locally employed staff.” Presumably, this recommendation will be acted upon with the same sort of determination needed to ensure that consular officers become more consistent in their NIV adjudications and that they are provided useful information from the FPU.

You be the Judge

Michael, a legal permanent resident for the past 30 years, has been convicted of two crimes involving moral turpitude: (1) passing a bad check with intent to defraud and (2) access device fraud. Michael appeals his case to a higher court, but DHS commences removal proceeding on the basis of the lower court convictions.

Michael argues that he cannot be considered to stand "convicted" for immigration purposes until all appeals have been waived or exhausted. In support of this claim, he cites to a 1955 Supreme Court case, *Pini v. Landon*, holding that a conviction needs to attain "finality" in order to support an order of deportation.

Given that deportation is such a drastic measure, especially when it involves someone who has lived in our country for three decades, do you intuitively permit Michael to exhaust the judicial remedies afforded him under law, or do you allow DHS to continue with the deportation proceedings? (See below for the ruling in the actual case involving Michael.)

Heathrow Airport on September 12, 2001 (by Eric Fichte)

In the immediate aftermath of the 9/11 terrorist attacks, American citizens trying to get home found themselves stranded at foreign airports. Embassy London, as always at the forefront of proactive consular service, sent Conoffs to Heathrow Airport to see how they could be of assistance to the hundreds of Americans marooned there. The team's story, authored by Eric Fichte, follows, below.*

"It was Wednesday evening, September 12, 2001, at Heathrow Airport, where several hundred Americans were stranded. Two consular officers had been dispatched with instructions to figure out what was going on, do what they could to settle these people for the night, and make sure accurate information was being disseminated. I was one of them.

“The only television they have in this place is in the bar,” he said, sounding annoyed.

“I’m sorry about that, sir,” I replied. “I’m happy to tell you as much as the embassy knows.”

“Yeah, yeah. I want to know one positive thing you guys have done. One positive thing,” he said, issuing the challenge, confident the odds were in his favor.

“We’ve convinced an airline to change its policy and put stranded Americans in hotels, negotiated with hotels to offer reduced rates for American citizens, helped countless stranded travelers find lodging, and filled prescriptions for stranded Americans with health conditions.”

“Oh,” he said, and headed back to the bar.

The terminal was a zoo. Over 200 people were piled into a lounge, bodies crammed into corners or bent at odd angles to create the semblance of a flat surface. Faces peered out from behind piles of luggage. Airport representatives, exasperated that the airlines had not done so all day, fed the masses. Hands reached into food boxes stacked precariously on hand trolleys. Small bags of potato chips and bottles of mineral water sailed through the air. Dinner was finally served.

Misinformation was king. Uncertainty and doubt ruled. Some airline representatives sent passengers directly to hotels; others told people to check back every 15 minutes. Meanwhile, some airlines were checking baggage and issuing boarding passes for phantom flights. And into this mess flew a constant stream of incoming flights, all delivering more bodies, more statistical robustness, to the equation.

Our task was straightforward: inform as many people as possible about what we knew and what we expected, and assist as much as possible with what to do in the meantime. While we didn’t have much hard information, close consultation with embassy FAA representatives allowed us to provide a realistic assessment of the next 48 hours. A resumption of flights was highly unlikely. We had to make that clear.

Passing the word turned out to be much easier than initially feared. Instead of anger, we saw gratitude when we told passengers they would probably not fly for at least a couple of days. People didn’t mind hearing bad news, just so long as they received an honest assessment of what they faced. Perhaps some airlines set the stage by building expectations to unreasonable levels. Or perhaps most everyone traveling understood that while they had been inconvenienced, the true tragedy was in the United States.

As we worked our way through the terminal, talking to as many Americans as we could find, another amazing event unfolded before us. Private American citizens, having heard about the stranded passengers, descended on the airport to open

their homes and their hearts. Amid the confusion, we now had a terrific tonic — compassion.

For the next two days, we repeated our message. Tempers shortened slightly and emotions surfaced quicker for all involved, but the peace held and we were still able to make a difference. We filled prescriptions for stranded Americans with health concerns, negotiated reduced rates at area hotels for Americans, helped organize and coordinate our private citizens' efforts, pointed people in the right direction and — above every thing else — spoke in a frank and straightforward manner. It was the least we could do."

*Originally published in the *Inside a U.S. Embassy: Diplomacy at Work* (2003/5 edition). Reprinted with permission. BTW, the All-New Third Edition of *Inside a U.S. Embassy* is now available; this essential guide to the Foreign Service can be ordered here: http://www.afsa.org/inside_a_us_embassy.aspx

You be the Judge: The Actual Court Ruling

When presented with this case just two months ago, the United States Court of Appeals for the Ninth Circuit allowed DHS to continue with the deportation proceedings against Michael.

Under the 1996 amendments to the INA (which supplanted the prior judicially-created standards), a "conviction" means that a court has entered "a formal judgment of guilt of the alien." Accordingly, a conviction for immigration purposes exists when a trial court enters a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived.

While it might be unfair to remove a foreign national from the United States when an appeal was pending, the court concluded that it could not deviate from the plain language of the statute "regardless of our view on the wisdom or efficacy of Congress's policy choices."

Planes v. Holder: <http://www.ca9.uscourts.gov/datastore/opinions/2011/07/05/07-70730.pdf>

Parenthetically, the Ninth Circuit's decision lends clarity to the provisions of 9 FAM 40.21(a) N3 ("Cases in which Conviction Exists").
<http://www.state.gov/documents/organization/86942.pdf>

Changes to the Foreign Affairs Manual (FAM) – Monthly Report

Services Performed for DHS by Consular Officers (9 FAM Appendix N, 100)

In this update, the Department of State (DOS) clarifies when consular posts must, or must not, perform services on behalf of the Department of Homeland Security (DHS). In the words of the update:

“All posts **without** an appropriate DHS component -- U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), or U.S. Immigration and Customs Enforcement (ICE), including a public counter for some services -- must provide services on behalf of DHS as outlined in this Appendix and throughout 9 FAM. Posts at which an appropriate DHS component offers public counter service **must** refer applicants seeking DHS services to that office.”

The services outlined in Appendix N include actions such as taking fingerprints and approving certain kinds of immigration petitions.
<http://www.state.gov/documents/organization/88017.pdf>

Authorization to Approve Petitions at Certain Posts (9 FAM Appendix N, 200)

The FAM has been updated to reflect recent process changes for I-130 petitioners residing overseas. Pursuant to those changes, petitioners residing in countries without USCIS offices must now file their Form I-130 at the USCIS lockbox facility in Chicago. Parenthetically, a primary purpose of this change was to reduce costs to DHS, given the \$3 million bill that DOS presented to USCIS for the service of adjudicating Form I-130 at consular posts abroad in FY 2010.
<http://www.state.gov/documents/organization/88018.pdf>

Timely Retraction of Misrepresentation (9 FAM 40.63 N4.6)

As a general rule, foreign nationals resorting to willful misrepresentations for the purpose of obtaining visas or otherwise effecting an unauthorized entry into the United States are inadmissible to the country under INA under 212(a)(6)(C)(i). Under a long-standing exception to this rule, an applicant's timely retraction serves to purge a misrepresentation and remove it from consideration as a ground for inadmissibility.

In a new update to 9 FAM 40.63, DOS clarifies that the “timely retraction” rule also applies to foreign nationals resorting to false claims of U.S. citizenship for the purpose of procuring U.S. passports, entry into the U.S. or any other benefit under State or Federal law which would otherwise make them inadmissible under INA 212(a)(6)(C)(ii).

What makes a retraction “timely”? According to 9 FAM 40.63 N4.6:

“Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. If the

applicant has personally appeared and been interviewed, the retraction must have been made during that interview. If the misrepresentation has been noted in a "mail-order" application, the applicant must be called in for an interview and the retraction must be made during the course thereof. For this reason, aliens must be warned of the penalty imposed by INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) at the outset of every initial interview."

<http://www.state.gov/documents/organization/87011.pdf>

Person Centric Query Service (PCQS)

In a series of updates to the FAM provisions relating to petition-based visa categories, consular officers are advised that PIMS is no longer the sole source by which they may verify DHS petitions; instead, verification may now also be made through the Person Centric Query Service (PCQS).

See, for example, the Notes to the L-1 visa category at 9 FAM 41.54:

"An approved Form I-129, Petition for a Nonimmigrant Worker, must be verified either through the Petition Information Management Service (PIMS) or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab, before a visa can be issued."

PCQS was created in response to the 2006 Rice-Chertoff Joint Vision ("Secure Borders and Open Doors in the Information Age") which called, in part, for increased sharing of immigration and visa data between DHS and DOS. In support of this information-sharing initiative, PCQS was developed to provide both users from both agencies with a consolidated view of all information about an individual in selected USCIS and DOS databases.

Consular Corner Quiz

1. A visa applicant whose name comes up as a "hit" against a name listed in the Consular Lookout and Support System ("CLASS") database will likely be subject to which form of background check?
 - (a) Visas Condor
 - (b) Visa Donkey
 - (c) Visas Mantis
2. Which entity has more employees: The United States Foreign Service or United States Citizenship and Immigration Services?
3. Do Canadian passport holders seeking to travel visa-free to the United States need to apply for advance approval with the Electronic System for Travel Authorization (ESTA)?

4. What percentage of overseas Forms I-601 were filed in Ciudad Juarez in FY 2010?

- (a) 25%
- (b) 33%
- (c) 50%
- (d) 75%

5. A U.S. consular officer asks an applicant to "show him the money trail" in order to prove eligibility for the requested nonimmigrant visa. Which visa is the applicant seeking to obtain?

6. Theresa has two passports: An Argentinean, valid for another 3 years; and a Russian which expired last week. Theresa needs to urgently travel to New York, but her valid B-1/B-2 visa is in the expired Russian passport. May she be admitted to the United States by presenting the valid visa in the expired Russian passport together with her valid Argentinean passport?

7. According to the Code of Federal Regulations, the authority to take personnel actions (such as hiring, firing, recommending promotions or vacation time) is generally vested in which of the following L-1 capacities?

- (a) Executive
- (b) Manager
- (c) Specialized Knowledge

8. May applicants for immigrant visas be found inadmissible to the United States because of a learning disability?

9. Approximately how many visa applicants are referred to the State Department for Security Advisory Opinions (SAOs) each year?

10. This US Consulate General is housed on property which had originally been part of a French military garrison. The facility, initially opened as an embassy, was evacuated in the face of a rebel assault in September 1967 and eventually reopened in 1999. Where is this Consulate General located?

Top Ten Visa Wait Times at U.S. Consular Posts, September 2011*

The Global Support Strategy (GSS) program is meant to add efficiencies to the visa application process. It's thus counterintuitive that, since the introduction of the GSS program in Mission Mexico at the start of 2011, visa wait times at Mexican posts have soared. For example, Guadalajara's wait times have rocketed from 14 days in January to 90 days in September. Monterey's wait times have surged from 2 in January to 78 in September. Of course, GSS may not be the

culprit, as evidenced by Paramaribo, a non-GSS post for the time being, where wait times have risen from a single day in January to 56 in September.

#	Country	Consular Post	Visa Wait Time	Increase/decrease from Last Month	Position Last Month
1	Cuba	Havana (U.S. Interests Section)	999 days	Unchanged	1
2	Venezuela	Caracas	190 days	-1 day	2
3	Brazil	Brasilia	127	+ 71 days	9
4	Brazil	Sao Paulo	123	+ 18 days	4
5	Nigeria	Lagos	120	- 2 days	3
6 (tie)	Brazil	Rio de Janeiro	94 days	- 6 days	5 (tie)
6 (tie)	Brazil	Recife	94 days	+ 30 days	6
7	Mexico	Guadalajara	90 days	+55 days	New Listing
8	Mexico	Monterrey	78 days	+ 50 days	New Listing
9	Nigeria	Abuja	60 days	Unchanged	8
10	Suriname	Paramaribo	56 days	+ 5 days	7 (tie)

** Updated to September 5, 2011 and based on published Department of State data. The “visa wait time” is the estimated time in which individuals need to wait to obtain a nonimmigrant visa interview appointment at a given consular post.

Top Wait Times by Region:

The Americas (excluding Cuba)	Venezuela/Caracas	(190 days)
Africa	Nigeria/Lagos	(120 days)

Middle East and North Africa	Egypt/Cairo	(43 days)
Europe and Eurasia	Turkey/Ankara	(33 days)
East Asia and Pacific	Burma/Rangoon	(25 days)
Central and South Asia	Afghanistan/Kabul	(23 days)

Answers to Consular Corner Quiz

- 1) (b)
- 2) USCIS, with 12,000 (the Foreign Service has 11,500 employees).
<http://www.gao.gov/new.items/d11881.pdf>
- 3) No. https://help.cbp.gov/app/answers/detail/a_id/1094/~/~do-i-need-to-apply-for-esta
- 4) (d)
<http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/IO-IASB%20Meeting%20Notes%2001%2026%202011.pdf>
- 5) E-2 Treaty Investor. <http://www.state.gov/documents/organization/87220.pdf>
- 6) No. Although it is sometimes possible to travel to the United States with two passports, both passports (the valid and the expired one with the visa) must be from the same country. http://travel.state.gov/visa/questions/questions_1253.html#7
- 7) (b). 8 CFR 214(2)(l)(1)(ii)(B)
- 8) It's possible, under the "public charge" provision of 212(a) (4).
http://www.travel.state.gov/visa/immigrants/info/info_3745.html (See also 9 FAM 40.11 N8.)
- 9) 300,000
<http://judiciary.house.gov/hearings/pdf/Alden5112011.pdf>
- 10) Ho Chi Minh City, Vietnam
<http://photos.state.gov/libraries/hochiminh/174995/pdf/congen-history.pdf>

Quote of the Corner

"The Foreign Service is more than just living in another country. It's getting to know people. It's getting steeped in their culture. It's being able to swim in the sea in which we live."

Cameron Munter, U.S. Ambassador to Pakistan.

<http://thekojonnamdishow.org/shows/2011-09-22/diplomacy-post-911-life-us-foreign-service/transcript>

***Liam Schwartz** is a principal in Liam Schwartz & Associates, a corporate immigration and consular law firm. He can be reached on [Facebook](#), and at Liam@lsa-law.com

All rights reserved to the author.